

CHAPTER 10 – VIOLATIONS OF PROTECTIVE ORDERS AND CONTEMPT

STATUTORY REFERENCES: **RSA 173-B: 9 (Violation of Protective Orders)**

INTRODUCTION

RSA 173-B: 9 provides two distinct responses to violations of protective orders: (1) the statute makes the violation of a protective order issued under RSA 173-B or RSA 458:16 or any foreign protective order enforceable in New Hampshire a class A misdemeanor if the defendant was shown to have knowingly violated the order; and (2) the statute also gives recognition to the court's authority to enforce protective orders through its contempt powers. Under RSA 173-B the prosecution and sentencing of a defendant for criminal contempt for violation of a protective order does not bar the prosecution and sentencing of that defendant for other criminal charges underlying the contempt.

COMMENT

An order issued pursuant to RSA 173-B: 5 may include both *protective orders*, as provided in RSA 173-B: 5, I (a), and *other orders* of relief related to such issues of custody or child support, as defined in RSA 173-B: 5, I (b). *Protective provisions* of an order may be enforced through arrest and prosecution. The court may also enforce protective provisions through its inherent authority to punish contempt, either civilly or criminally. See Rogowicz v. O'Connell, December 10, 2001; State v. Wallace, 136 N.H. 267, 269-70 (1992); and Opinion of the Justices, 86 N.H. 597, 602 (1933). However, in some circumstances, double jeopardy may bar such a dual prosecution. See State v. Goodnow, 140 NH 38 (1995). Enforcement of non-protective orders of relief must be sought through the court's contempt powers.

A. TYPES OF CONTEMPT

Contempt proceedings can be either summary or non-summary. A summary contempt is only appropriate when the contemptuous conduct occurs in the presence of the court. Otherwise,

all contempt proceedings are considered non-summary and may be either civil or criminal in nature.

1. Civil Contempt

Civil contempt is remedial in nature. Its purpose is to coerce compliance with a court order for the benefit of the other party. Civil contempt is appropriately instituted where the party against whom the contempt complaint has been filed has failed or refused to comply with a valid, unambiguous court order. A classic example is the filing of a civil contempt action for failure to make a child support payment.

2. Criminal Contempt

The purpose of non-summary criminal contempt is to vindicate the authority of the court and to punish a party for violating an order of the court. Criminal contempt can implicate a person's liberty interests and thus a person charged with criminal contempt is entitled to the same rights afforded any criminal defendant. For that reason, criminal contempt should not be considered the first option in addressing contemptuous conduct. Criminal contempt prosecution is appropriate where it is unlikely that civil remedies will lead to the abatement of the alleged contemptuous conduct, if the conduct poses a threat to the other party's safety or property, or if the conduct is of a repetitive nature.

B. INITIATION OF PROCESS

The contempt process is initiated by the filing of a notice with the court, by the plaintiff, alleging that the defendant has violated a provision of a protective order.

PROTOCOL 10-1

The plaintiff must set forth in writing and with specificity the acts alleged to constitute a violation of the court's orders.

PROTOCOL 10-2

The court shall docket the complaint as part of the underlying domestic violence protective order file.

1. Initial Determination by the Court

PROTOCOL 10-3

Upon receipt of written notice that a defendant has violated a protective order, the court should review the document to make an initial determination whether the allegations, if founded, would warrant a finding of criminal contempt. If so, the court should instruct the clerk to forward the notice, along with a copy of the underlying protective order, to the local prosecuting

agency having jurisdiction over the alleged misconduct.

COMMENT

In Rogowicz, the New Hampshire Supreme Court held that because criminal contempt proceedings are between the public and the defendant, the complaints “should, in the first instance, be referred to the executive branch for prosecution.”

NOTE: In making this determination, the court should consider whether the alleged contemptuous conduct, if established: (a) would constitute a violation of the protective provisions of the protective order, see RSA 173-B:5, 1(a), and thus a criminal violation; (b) involved otherwise criminal conduct; or (c) constitutes a violation of the order that would justify a punitive remedy. If so, a referral for criminal prosecution is appropriate. If not, or the conduct is more akin to a failure to make payments or turn over property, the court should consider allowing the matter to proceed as a civil contempt.

2. Referral for Prosecution

PROTOCOL 10-4

A copy of the referral letter shall be sent to the defendant.

PROTOCOL 10-5

The court shall wait **10 business days** for a response from the local prosecuting agency as to whether it intends to investigate the matter, file a criminal complaint, or pursue the contempt.

COMMENT

If a criminal complaint is filed, it should be handled as any other criminal matter. If a criminal complaint is filed, the balance of this protocol in Chapter 10 will not apply.

PROTOCOL 10-6

In the event that the prosecuting agency does not respond or declines to pursue the case, the court may consider referring the case to the county attorney. If the county attorney declines to pursue an investigation or prosecution, the court may consider appointing private counsel to prosecute the contempt on behalf of the State. If private counsel is not available, the court may give the plaintiff the opportunity to appear *pro se*.

COMMENT

There is currently no funding available to pay for appointed counsel.

NOTE: There is no requirement that a case be referred for prosecution. If the victim wishes to proceed *pro se*, the court should permit this.

C. ENFORCEMENT OF COURT ORDERS THROUGH THE CONTEMPT POWERS OF THE COURT

1. Notice to the Defendant

Regardless of whether the court treats the matter as civil or non-summary criminal contempt, notice must be given to the defendant as set forth in the following protocol.

PROTOCOL 10-7

Upon the court's determination that the matter should be dealt with as civil contempt, or upon the local prosecuting agency's agreement to prosecute the matter as criminal contempt, the court shall issue an order summoning the defendant to appear and show cause why a finding of contempt should not be made. A copy of the plaintiff's allegations must be appended to the order.

NOTE: In the event that the prosecuting agency indicates it will investigate the matter as a criminal offense, the court should withhold issuing orders to allow the investigatory and charging process to proceed.

PROTOCOL 10-8

The initial hearing should be scheduled, if possible, **no later than 14 days** after the court's determination or receipt of the prosecutor's notice of acceptance of the matter.

PROTOCOL 10-9

The court's orders of notice should be transmitted to law enforcement for in-hand service upon the defendant. The court may order other service as appropriate, including restricted first-class delivery.

2. Initial Hearing/Arraignment

PROTOCOL 10-10

The initial hearing/arraignment should, if possible, be held **within 14 days** of the receipt of the prosecuting agency's decision referenced above.

PROTOCOL 10-11

At the initial hearing/arraignment, the court should assure that the defendant has received and understands the allegations and potential penalties.

PROTOCOL 10-12

If the matter is to be treated as civil contempt there is no right to counsel for cases alleging civil contempt of court. The defendant may appeal issues of law to the Supreme Court.

PROTOCOL 10-13

If the matter is to be treated as non-summary criminal contempt, the defendant must be advised that the maximum penalty upon conviction will not exceed six months in the house of corrections unless the defendant is given the right to jury trial, in which case the maximum penalty will be 12 months. (See State v. Linsky, 117 N.H. 866 (1977), State v. Matthews, 37 N.H. 450 (1859).) Defendant must also be advised of the right to counsel, and counsel shall be appointed if the defendant demonstrates indigence.

NOTE: Since important liberty interests are at stake in non-summary criminal contempt cases, the court must be careful to follow all proper procedures.

PROTOCOL 10-14

If the defendant fails to appear, the court must satisfy itself that the defendant received actual notice of the hearing and if that determination is made, a bench warrant should issue for the defendant's arrest, and default through the Division of Motor Vehicles should be noted.

3. Civil Contempt

PROTOCOL 10-15

The burden of proof rests with the plaintiff to prove the case by clear and convincing evidence.

PROTOCOL 10-16

The plaintiff should be called upon to offer testimony or witnesses to support the allegations made in the contempt notice.

PROTOCOL 10-17

At the close of the plaintiff's case, the defendant should be afforded the opportunity to offer testimony and/or witnesses to rebut the allegations.

PROTOCOL 10-18

In reaching a verdict, the judge should keep in mind the following:

- a. The order alleged to have been violated should be valid and unambiguous; and,
- b. The burden of proof is upon the plaintiff, and the standard to be followed is "clear and convincing evidence". If the court finds the defendant guilty of civil contempt, the sanctions imposed should be either remedial or coercive in nature and for the benefit of the plaintiff. A written opinion should be issued, which refers to the standard of "clear and convincing evidence", provides the requisite factual basis for any contempt findings and sets forth clearly the sanctions imposed and a method by which the contempt may be purged by the defendant.

4. Non-Summary Criminal Contempt Process

PROTOCOL 10-19

The court must ensure that the defendant understands that if the maximum penalty to be imposed upon conviction is six months in the house of corrections, the judgment of the district court is final, and there is no right to jury trial or appeal to the superior court. (See State v. Linsky, 117 N.H. 866 (1977), State v. Matthews, 37 N.H. 450 (1859). A defendant may appeal to the Supreme Court.

PROTOCOL 10-20

If the defendant elects to proceed without counsel, the court should make a careful record of the defendant's waiver in a written finding that the defendant understands the right and knowingly and intelligently waives that right.

PROTOCOL 10-21

The plaintiff, as the moving party, has the burden of proving beyond a reasonable doubt that the defendant's acts were intentional and not the result of accident and that they violate the court's order. As in any criminal matter, the defendant has no obligation to present evidence, and the right against self-incrimination is fully applicable.

PROTOCOL 10-22

A written opinion should be issued which provides the requisite factual basis for any finding made by the court, and includes a reference to the "beyond a reasonable doubt" standard of proof. Where non-summary criminal contempt is found, the sanctions imposed should be clearly stated.

NOTE: Because of the escalating nature of domestic violence and/or stalking and the potential for danger to the victim, judges should consider incarceration as an

option for all contempt convictions. Also, since the nature of stalking involves repetitive acts, evidence that an individual has engaged in stalking or related acts, such as founded cases of domestic violence or other assaults, should be brought before the judge, prior to sentencing.

PROTOCOL 10-23

If the defendant is convicted, it is recommended that the matter be referred to the Department of Corrections for a pre-sentencing evaluation to assess the defendant's risk of lethality.

PROTOCOL 10-24

Review for alcohol and substance abuse, mental health problems, the need for batterer intervention and access to weapons should be done prior to sentencing. Using the risk assessment list in RSA 597:2, III-a is recommended.